NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DOLORES GALINDO,

Plaintiff,

v.

AMERICAN AIRLINES,

Defendant.

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No. C 03-3671 PJH

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART AND DENYING IT IN PART

The motion of defendant American Airlines ("American") for summary judgment came on for hearing on June 8, 2005, before this court. Plaintiff Dolores Galindo appeared by her counsel Daniel Ray Bacon, and American appeared by its counsel Kenneth R. O'Brien. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion in part and DENIES it in part as follows and for the reasons stated at the hearing.

INTRODUCTION

Plaintiff Dolores Galindo, a Hispanic female, was employed by defendant American Airlines ("American") from September 30, 1991, to June 30, 2003, in various capacities relating to cargo operations. At the time of the incidents that gave rise to the claims in this case, she was a Cargo Claims Coordinator at San Francisco International Airport. This position is classified as a management position.

Plaintiff claims that she was discriminated against based on her national origin by her manager in Cargo Services, Michael Baum ("Baum"). Following a series of incidents in which plaintiff was counseled by Baum about her public criticisms or reprimands of other employees – in particular about plaintiff's criticisms of Cargo Agent Greta Betteo ("Betteo") – plaintiff complained to American's Human Resources ("HR") department about the documentation of the counseling. After plaintiff made further negative comments about Betteo at a union meeting in May 2001, Baum met with her in June 2001 and advised her that her behavior was inappropriate. Baum later received additional complaints about plaintiff's criticisms of Betteo and other employees.

In December 2001, American conducted a review of I-9 forms[1] in preparation for an FAA audit. Plaintiff's I-9 form did not have a complete expiration date listed for her driver's license. Baum claims that he asked plaintiff to update her information, and that she provided her passport for examination. Her information was updated, and Baum never spoke to plaintiff about it again. Plaintiff's version is that Baum refused to accept plaintiff's driver's license as identification, told her there was an unspecified problem with her social security number, and demanded that she show proof of U.S. citizenship. (However, in her deposition, plaintiff testified that Baum stated that there were some "questions" regarding her social security number, and that to avoid any complications or suspension of employment, she needed to provide him with either a birth certificate or a passport as proof of citizenship.) Plaintiff asserts that the driver's license should have been adequate to correct the I-9 deficiency, and that there was never any actual problem with her social security number.

Following this incident, plaintiff made an oral complaint to Laurie Cleary ("Cleary") in the HR department. She claims that after this complaint, Baum retaliated against her by

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[1] This is United States Immigration Form I-9, the "Employment Eligibility Verification Form." Under the Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.), and the Immigration Act of 1990, ("1990 Act"), Pub.L. No. 101-649, 104 Stat. 4978 (codified at 8 U.S.C. § 1324c (1990)), an employer is required to attest under penalty of perjury in the Form I-9 that it has examined the requisite documents showing the employee's identity and employment authorization and thereby verified that its employee is not an unauthorized alien.

requiring her to perform job duties that were outside the scope of her job description, by canceling training classes that she had set up for other employees, by falsely accusing her of revealing confidential information from employee personnel files, and by falsely accusing her of somehow involving the police in an investigation of union employees.

Plaintiff filed two additional complaints about Baum with HR, the first with Pat Sakestaad ("Sakestaad"), and the second with Jim Obeker ("Obeker"). She claims that after she filed the second of those two, in March 2002, Obeker told her there was nothing American could do to stop Baum from harassing her. (However, the letter from Obeker, attached as an exhibit to the Galindo Declaration, simply states that based on the information plaintiff had provided and the results of the interviews conducted during the investigation, Obeker was "unable to substantiate [plaintiff's] claim of harassment.") Baum states that he was unaware that plaintiff had made any complaints about him to anyone in HR during the time she was employed at American.

In January 2002, a supervisor sent an e-mail to members of management concerning an incident involving a shipment of human remains. The e-mail was critical of the actions of the agents who had claimed they did not know how to process such a shipment. American claims that plaintiff shared this e-mail with non-management employees to whom it was not addressed. Baum then apparently received a complaint from one of the non-managerial employees, and asked plaintiff to explain her actions.

Baum met with plaintiff on February 8, 2002, to advise her he was concerned about her performance. He asked plaintiff to choose between the alternatives of developing and executing a plan to improve her performance, or exploring other employment positions within American. Baum also documented these discussions. Baum asked plaintiff to think it over and meet with him again on February 12, 2002, to advise him of her decision. Plaintiff requested a change of meeting date, and so did not meet with Baum as scheduled. On February 25, 2002, plaintiff met with a representative from HR to discuss the alternatives Baum had given her. Plaintiff testified in her deposition that she decided, no later than February 27, 2002, that she was going to take a medical leave of absence immediately after

she met with Baum.

Plaintiff finally met with Baum on March 4, 2002. At that meeting, she read Baum a document requesting that any criticism of her be expunged from her file, and asked that Baum be required to note in writing assigned tasks outside her regular assigned job duties. According to plaintiff, Baum then shared some of his notes concerning his observations about her job performance. Plaintiff claims that she became so upset she "couldn't sit there any longer," and left the workplace. She never responded to Baum's suggestion that she either formulate an improvement plan or seek employment elsewhere within American.

On March 4, 2002, plaintiff took a medical leave of absence (stress leave). She was never cleared by her health care providers for a return to work. After she stopped working, her job responsibilities were divided up and reassigned to other employees. American claims that as a result of financial losses following the events of September 11, 2001, it reduced management and non-management personnel in all departments, including Cargo. The number of management positions was reduced in 2001, and again in 2002.

Plaintiff filed a charge of discrimination with the California Department of Fair Employment and Housing on April 9, 2002, alleging race, sex, and age discrimination. She filed a charge of discrimination with the Equal Employment Opportunity Commission on May 2, 2002, alleging discrimination on the basis of national origin, and retaliation. On April 30, 2003, the EEOC issued plaintiff a notice of closure of her case, and a right-to-sue letter. Plaintiff received the right-to-sue letter on May 19, 2003.

In 2003, the Cargo Division ordered a reduction in force. According to Baum, the Cargo managers were directed to evaluate their employees based on their "criticality" and directed to select the least critical positions and employees for inclusion in the reduction in force. On June 30, 2003, American (through Baum) notified plaintiff that she was being laid off as part of a reduction in force.

Baum states that he selected plaintiff's position to eliminate because plaintiff had been absent from the workplace for over 15 months, and her duties had been assumed by other personnel. When Baum eliminated plaintiff's position, she was the only member of

management who was not working, and he claims he eliminated plaintiff's position solely because it was not critical. Baum states that 15 managers were working in SFO Cargo in June 2000, and that there are only 7 such positions at the present time.

Plaintiff filed the complaint in this action on August 6, 2003, and filed the first amended complaint ("FAC") pursuant to stipulation on December 20, 2003. In the FAC, plaintiff alleges three causes of action – discrimination on the basis of national origin, in violation of Title VII; retaliation (hostile work environment), in violation of Title VII; and retaliation (termination of employment), in violation of Title VII.[2] American now seeks summary judgment on all three causes of action.

DISCUSSION

A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are those that might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. On an issue where the nonmoving party will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Id.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is

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[2] The FAC also alleged a fourth cause of action for wrongful termination in violation of public policy, but plaintiff dismissed that claim with prejudice.

a genuine issue for trial." Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 250. "To show the existence of a 'genuine' issue, . . . [a plaintiff] must produce at least some significant probative evidence tending to support the complaint." Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990) (quotations omitted). The court must view the evidence in the light most favorable to the non-moving party. United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003). The court must not weigh the evidence or determine the truth of the matter, but only determine whether there is a genuine issue for trial. Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

Deference to the non-moving party has some limits. Thus, a plaintiff cannot rest on the allegations in her pleadings to overcome a motion for summary judgment. Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995); Ghebreselassie v. Coleman Sec. Serv., 829 F.2d 892, 898 (9th Cir. 1987). Self-serving affidavits will not establish a genuine issue of material fact if they fail to state facts based on personal knowledge or are too conclusory. Rodriquez v. Airborne Express, 265 F.3d 890, 902 (9th Cir. 2001). Regardless of whether plaintiff or defendant is the moving party, each party must "establish the existence of the elements essential to [its] case, and on which [it] will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

B. Defendant's Motion for Summary Judgment

American now seeks summary judgment on the three causes of action alleged in the FAC.

1. National origin discrimination[3]

American argues that there is no triable issue of fact with regard to the cause of action for national origin discrimination, based on plaintiff's assertion that the only basis for this claim is that she was asked by Baum to provide additional information to update her I-9 form on file with American.

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[3] Plaintiff's counsel clarified at the hearing that plaintiff is proceeding under a theory of disparate treatment only, not under theories of both disparate treatment and hostile work environment, and that she is asserting national origin discrimination only, not discrimination based on race, gender, or age.

Under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a plaintiff alleging disparate treatment under Title VII must first establish a prima facie case of discrimination. Id. at 802. Specifically, the plaintiff must show that (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably. Id.

The plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment. Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995). This is because "the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record." Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996) (citations and internal quotation marks omitted).

Once the plaintiff has established a prima facie case, the burden of production, but not persuasion, then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action. McDonnell-Douglas, 411 U.S. at 802. If the employer does so, the plaintiff must show that the articulated reason is pretextual "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

In the present case, neither side specifically discusses the elements of the prima facie case, although counsel for American stated at the hearing that American did not intend to concede that plaintiff had established a prima facie case. Instead, American primarily argues that it had a legitimate business reason for the request that plaintiff update her employment information. American notes that plaintiff testified in her deposition that her sole basis for asserting national origin discrimination was that she was asked to provide additional documentation to update her I-9 information. American provides evidence showing that this request was made as part of an FAA audit of all American employees following the September 11 attacks; that plaintiff's I-9 form on file with American was incomplete because it

failed to list the expiration date of her "List B" document;[4] that Baum requested this information of 50 employees of all races in his group (including plaintiff); and that plaintiff admits that once she provided the information, Baum never mentioned the matter again. American contends that plaintiff cannot now argue something that contradicts her deposition testimony.

American argues in addition that plaintiff has provided no evidence to demonstrate that non-Hispanic employees who engaged in similar conduct were treated differently with regard to the I-9 information, or that Baum counseled plaintiff because she was Hispanic rather than because of her work performance problems. With regard to plaintiff's claim that another employee, Sandra Rodas, also experienced problems with Baum in connection with the request for I-9 information, American asserts that Rodas' situation was different from plaintiff's, in that Rodas was a non-citizen with an expired alien registration card, and whose I-9 also contained an incomplete social security number.

In opposition, plaintiff simply asserts that "the driver's license should have been perfectly adequate to correct the I-9 deficiency." She seems to be arguing that Baum's request for a passport or a birth certification was in itself an act of national origin discrimination.

The court finds that the motion must be GRANTED. Plaintiff has provided no evidence to show the existence of a triable issue with regard to the claim of national origin discrimination. She testified in her deposition that Baum never referred to her in any way concerning her Hispanic origin, and that he never posted any cartoons, posters, or graffiti containing any comment on her national origin. She also testified that no member of

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[4] Section 1 of Form I-9, entitled "Employee Information and Verification," requires the applicant to attest to his work eligibility. Section 2 of the form, entitled "Employer Review and Verification," requires the employer to examine an applicant's documents and certify that the documents appear to be genuine and that the individual is eligible to work in the United States. The employee may present one document from List A or one document from each of Lists B and C. The documents on List A, such as an alien registration card (green card) or a U.S. Passport, establish both identity and work eligibility. The documents on List B, such as a driver's license, establish identity but not eligibility to work. The documents on List C, such as a social security card, establish eligibility to work but not identity. Robison Fruit Ranch, Inc. v. United States, 147 F.3d 798, 799-800 (9th Cir. 1998).

American's management made any such comments or engaged in any such behavior, and has stated that the sole basis for her claim was the request by Baum that she provide a passport or birth certificate for the I-9 information update. Moreover, she has identified no "adverse employment action," as part of her prima facie case. American, on the other hand, has provided undisputed evidence that it had a legitimate business reason for requesting the I-9 information update, while plaintiff has provided no evidence showing that American's explanation is unworthy of credence.

2. Retaliation during the course of employment

American argues that summary judgment should be granted as to the second cause of action for retaliation that occurred prior to the leave of absence, which commenced on March 4, 2002. In order to make out a prima facie case of retaliation, a plaintiff must show 1) that she engaged in a protected activity, 2) that she suffered an adverse employment action, and 3) that there was some causal link between the two. Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1065-66 (9th Cir. 2004). If plaintiff succeeds in making a prima facie showing, the burden shifts to the defendant employer to present a legitimate reason for the alleged adverse employment action. Id. at 1066. Once the defendant has articulated a legitimate business reason, the plaintiff can prevail only if she provides evidence showing that the proffered explanation is pretextual. Id. Absent such a showing, summary judgment is appropriate. Id. The evidence of pretext "must be specific and substantial in order to survive summary judgment." Brown v. City of Tucson, 336 F.3d 1181, 1188 (9th Cir. 2003).

American contends that it is undisputed that when plaintiff complained to HR personnel Cleary and Sakestaad, she complained about the coaching and counseling she had received in connection with her workplace friction with Betteo. Plaintiff testified in her deposition that her complaint to Cleary related only to what she described as experiencing "a great deal of resistance from Ms. Greta Betteo," and stated that she never heard back from Cleary. She testified that her complaint to Sakestaad was about the counseling documentation concerning the friction between herself and Betteo. She stated that in response, Sakestaad advised that she was upholding the counseling documentation, and also reminded plaintiff that both plaintiff

and Betteo had made a commitment to cease discussions of the conflict with other parties and "only remark to management of issues regarding the other employee."[5]

American argues that the complaints plaintiff made to Cleary and Sakestaad cannot provide the basis for a cause of action for retaliation because they were not "protected acts." Title VII protects two types of conduct from retaliation – opposition to practices prohibited by Title VII, and participation in EEOC proceedings. American contends that plaintiff did not engage in either type of activity when she complained to Cleary or Sakestaad. Her complaints were not about discrimination, but about the friction that existed between herself and Betteo, and the counseling she had received from Baum. American also reiterates that plaintiff cannot show a causal connection between her activities and the conduct engaged in by Baum because there is no evidence that Baum was aware of plaintiff's complaints.

In opposition, plaintiff contends that the complaint to Cleary was a complaint of Baum's "discriminatory treatment." The remainder of her opposition consists of a listing of the retaliatory actions that Baum allegedly took against plaintiff, including asking her to perform work that was not in her job description. However, she does not address the substance of American's motion as to this cause of action.

In reply, American asserts that plaintiff provides no evidence of retaliatory conduct taken on account of plaintiff's having engaged in a protected activity. American also contends that plaintiff has once again contradicted her deposition testimony – noting that she stated in her deposition that she did not have any problems with being asked to do additional work. American also contends that as a member of management, plaintiff was expected to be flexible and capable of adapting to change. Moreover, her job description specifically stated that it was not an all-inclusive list of duties. American asserts that plaintiff has provided no

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[5] Plaintiff admits to having had at least 14 meetings with managers regarding the conflict with Betteo. She conceded in her deposition that despite having been counseled not to discuss the conflict with Betteo with third (non-management) parties, she nonetheless made negative comments about Betteo at a May 2001 meeting with union employees. It was her comments at that meeting that led Baum to meet with her in June 2001. At that meeting he told her that her behavior was unacceptable, and that it was inappropriate for her to criticize Betteo in front of non-management personnel. Subsequently, Baum received another complaint from Betteo that plaintiff had been "trashing" her to another employee.

evidence that Baum had any discriminatory or retaliatory motive for counseling her or for asking her to perform certain jobs.

The court finds that the motion must be GRANTED. Plaintiff has not established a prima facie case of retaliation during the course of employment, as she has not shown that she engaged in activity protected by Title VII. Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 43 U.S.C. § 2000e-3(a).

The complaints about the conflict with Betteo are not protected activity, and plaintiff provides no evidence to show that Baum was engaging an unlawful employment practice when he counseled her about the conflict, or even that she believed that he was engaging in an unlawful employment practice. See Trent v. Valley Elec. Ass'n, 41 F.3d 524, 526 (9th Cir. 1994) ("To establish the first element of a prima facie case, [plaintiff] must only show that [she] had a reasonable belief that the employment practice [she] protested was prohibited under Title VII."); see also Ashkin v. Time Warner Cable Corp., 52 F.3d 140, 144 (7th Cir. 1995) (finding that complaints about workplace conflicts "arose solely out of a non-sexual personality clash between two aggressive individuals" and did not represent a situation in which the plaintiff raised the Title VII issue in the complaint to the defendant); Coutu v. Martin Co. Bd. of Co. Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995) (holding that "unfair treatment, absent discrimination based on race, sex, or national origin, is not an unlawful employment practice under Title VII").

There is no evidence that plaintiff complained about anything that can be considered an unlawful employment practice or that she reasonably believed was an unlawful employment practice. Moreover, plaintiff provides no evidence to show that Baum was aware of her complaints, and therefore cannot show causation.

3. Retaliation (unlawful termination)

In the third cause of action, plaintiff asserts that Baum's decision to lay her off under the reduction in force in June 2003 was in retaliation for her having filed the EEOC charge in May 2002. American claims that this claim fails because, while plaintiff may be able to establish a prima facie case, she cannot show that American's stated reason for the elimination of her position was pretextual.

American asserts that the evidence shows that it had been reducing its workforce extensively, both before and after September 11, 2001, and that when plaintiff's position was eliminated in June 2003, the action was part of a system-wide reduction in force that eliminated a total of 30 Cargo positions. Baum states in his declaration that at that point, plaintiff had been off work for 15 months, her responsibilities had been assumed by other employees, she had never been cleared to return to work, and her position had never been reinstated or replaced.

In opposition, plaintiff contends that American has put forth two different statements of the reason for plaintiff's termination. Baum stated in his declaration that he selected plaintiff for layoff because she was not working at the time, and because her duties were being performed by other personnel, and that this was "the sole reason" he eliminated plaintiff's position. At the same time, however, in a document authored at time of the termination, entitled "Selection Decision for Galindo, Dolores," Baum stated (in response to request for comments re "why this person is less critical") that plaintiff "doesn't have the skills necessary to act as CSM or lead the employees. She is limited to loss and damage coordinator function. The employee can't add capacity to other tasks or multi-task. She is the least critical person in the SFO Cargo Services organization because everyone is able to multi-task." Plaintiff notes that nowhere in this explanation does Baum say that she was off work or that other employees were performing her functions. Plaintiff claims that based on this inconsistency in the proffered reason for the termination, a fact finder could conclude that the alleged reason was pretextual.

Plaintiff also contends that American failed to follow its own policies regarding layoffs.

Kerry Ackerman, a Senior Representative for H.R. for American testified in her deposition that the employees were to be laid off based on their "criticality." In plaintiff's case, Baum was the sole decisionmaker in deciding who would be laid off, yet he testified in his deposition that he had never done formal evaluations of his staff even though they were supposed to be reviewed each year. He also testified that he did not consult any personnel records or CR-1s (Counseling Records) when doing the rankings to determine which employees would be laid off. He claimed that he knew plaintiff could not perform other tasks he might assign, yet he testified that he never assigned her any of the tasks in question, never spoke to her about her alleged inability to "multi-task," and did not review her personnel file or other documents to determine her prior training. Plaintiff claims in her declaration that most of the tasks that Baum claims she was unable to perform were assigned to particular employees who had received training that had not been provided to her. She also asserts that there is evidence that other management employees not only could not multi-task, but also could not even perform their basic job duties.

Finally, plaintiff claims that although American had a policy of allowing laid-off employees an opportunity to seek other employment with the airline, Baum made an effort to see that plaintiff was not allowed to return to the company. He recommended that she not be rehired to any management position, despite the fact that he had previously given her a positive review, and despite the fact that she had received positive feedback from others. Moreover, plaintiff was the only employee Baum terminated during the June 2003 lay-off, and he testified that he, himself, was the person who determined the number of employees who would be laid off.

American responds that Baum did not give contradictory reasons for terminating plaintiff. American claims that Baum followed the company's guidelines for management reduction in force, which required that Baum evaluate the "criticality" of the employees in his organization as compared to other employees. He was instructed to evaluate each of his employees considering their specialized skills, knowledge, flexibility, and work performance. He states in his supplemental declaration that he considered the fact that no one had replaced

plaintiff in her position for more than a year, and that her duties had been reassigned over that period to other employees. He believed plaintiff's position was the least critical because it was no longer necessary. He claims that he evaluated the criticality of each of his employees pursuant to the reduction in force guidelines, and entered his assessment of plaintiff based on those guidelines – that her skills were limited and that she was unable to multi-task.

American notes that plaintiff admits that she did not have certain skills possessed by the remaining CSMs. For example, she concedes in her declaration that she had no experience dealing with the environmental coordinator or the grounds security coordinator or in building shift bids for fleet service clerks, agents, or mail employees; that she had no experience in the mail operation; that she was not knowledgeable about facility maintenance or auditing dangerous goods, or experienced in loss time or customer service manager representative duties; that she did not have the experience to handle financial audits; that she had no experience in managing head count or in handling reductions in force or recalls.

American also contends that plaintiff admits that there were complaints filed against her by Betteo, and that she cannot dispute that other employees complained about her as well (as stated by Baum in his declaration). She was counseled by Baum for breaching confidentiality and for the friction with Betteo, and was finally asked to choose between correcting her performance and looking for work elsewhere in American.

Finally, American argues that plaintiff fails to establish any causal connection between the filing of the EEOC charge in May 2002 and being laid off in June 2003, and reiterates that there is clear evidence of a legitimate, non-discriminatory reason for the elimination of plaintiff's position.

With regard to plaintiff's claim that American failed to follow its own procedures with regard to reviewing all positions eliminated as a result of a reduction in force, American asserts that Karry Ackerman testified at her deposition that American routinely conducts reviews of reductions in force. While Ackerman could not recall any specifics of plaintiff's termination, American argues that her testimony does not support plaintiff's claim that American failed in this instance to follow its own procedures.

The court finds that the motion must be DENIED as to the third cause of action, and that disputed issues of material fact preclude summary judgment. While American has provided evidence tending to show a legitimate non-discriminatory reason for plaintiff's termination – the company was engaging in a reduction in force, plaintiff's position had not been filled, and her job duties had been reassigned – plaintiff has pointed to evidence that raises a question with regard to whether American's proffered reason is pretextual.

In particular, Baum provided what appears to be somewhat different reasons for plaintiff's termination – stating in his declaration that the sole reason for her termination was that she was not working at the time and her position had not been filled, and then stating at the time of the reduction in force that plaintiff was selected for termination because she could not multi-task. In addition, while Baum claimed that plaintiff was less qualified that other employees based on experience or abilities in particular areas, plaintiff provided evidence that showed that she was not offered any training in those areas.

4. Objections to evidence

Finally, American's objections to evidence are OVERRULED. The objections are directed primarily at statements in plaintiff's declaration and in the declarations of Sandra Rodas and Andy Fresquez. Because the court does not rely on any of this evidence, the court need not consider whether it is admissible.

IT IS SO ORDERED.

Dated: July 8, 2005

PHYLLIS J. HAMILTON
United States District Judge